Mississippi Criminal Law Update

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Affirmative Defenses

Tyrone Body v. State
https://courts.ms.gov/Images/Opinions/CO154135.pdf

Body broke into his girlfriend's apartment, accused her of cheating and assaulted her.

Body argued that because of their relationship, he had permission to enter the girlfriend's apartment. The Court ruled that, besides the fact Body was not a leaseholder, since they were not married, there was no conjugal mutual right to occupy the residence. The state did not have to prove that Body lacked consent to enter, rather, consent to enter a residence is an affirmative defense to burglary and must be raised by the defendant and supported with whatever evidence the defendant wants to offer. Whether or not the breaking and entering was done with any intent to commit a crime, assault in this case, was a jury question.

Sufficiency of Evidence

Connell Gray v. State
https://courts.ms.gov/Images/Opinions/CO152884.pdf

Gray admitted to accompanying a friend of his who shot and killed a lady. But Gray told police he did not know of the shooter's plan. Gray was not standing with the shooter, according to Gray, when the shooter shot. Gray and the shooter ran off in different directions but were seen together later. They had been seen together during the day before the shooting. Gray was convicted of first-degree murder.

Issue Sufficiency: The Court said that the jury could "infer participation based on [Gray's] presence, companionship, and conduct before and after the offense."

James Sims v. State

https://courts.ms.gov/Images/Opinions/CO151408.pdf

Sims was on foot and was stopped near a crime scene by police searching for a suspect. He repeatedly refused to remove his hands from his pockets, was "irate" and cursed police in a public place and resisted arrest. He was convicted of disorderly conduct and resisting arrest.

The *Sims* majority held that there was sufficient evidence of disorderly conduct based on the "actions, behavior, and offensive language" of the defendant. The officer lawfully arrested Sims for disorderly conduct when he failed to obey police commands to show his hands and place them on the car under circumstances that could lead to a breach of the peace. Sims was a potential suspect in a crime that had already been committed. The investigatory stop of Sims was found to be valid and Sims' refusal to comply with the officers' instruction to remove his hands from his pockets increased the risk of danger for the officers, i.e., a breach of the peace. Sims was not arrested for his public profanity alone. Sims' arrest and conviction were for a combination of conduct and words.

Christopher Jones v. State

https://courts.ms.gov/Images/Opinions/CO153435.pdf

Christopher Jones was convicted of two counts of transferring a controlled substance for handing another man a fake soda can containing cocaine and methamphetamine.

On appeal, Jones argued that the evidence was insufficient to show that he knew there were drugs in the fake soda can or that he "permanently" transferred possession of the can.

Officer looking for Jones, spotted him at a Sonic drive in. When Jones saw the officer who called out to him, he handed the soda can to his companion – Ford. The officer got the can from Ford twisted the top off and found cocaine and meth. At trial, Ford testified that Jones handed him a gun and the can after the officer called to Jones, but Ford stated that the gun and can both belonged to Jones.

On appeal, Jones argued that the State failed to prove that he was aware of the contents of the can or that he "transferred" the can.

The Court found that there was sufficient evidence that Jones intended to get the soda can and drugs out of his possession and into Ford's hands. It was not necessary for the State to prove that Ford planned on keeping the drugs. The State only needed to show that Jones "intended to conceal the can by getting it out of his hands into the hands of another." The jury could logically infer that Jones was aware of the contents of the can from the fact that he tried to conceal it by handing it off to Ford.

Retroactive Misjoinder

Jones cont.

Jones also argues that under the doctrine of "retroactive misjoinder," he was entitled to a new trial on the drug charges because the jury found him not guilty on an illegal possession of a firearm count.

The Court noted that the doctrine of retroactive misjoinder does not apply just because the jury returned a split verdict. A defendant is not "entitled . . . to a new trial on the counts of conviction simply because the jury found the government's proof on other counts unpersuasive."

Rather, "[t]he doctrine of retroactive misjoinder applies when the defendant was prejudiced by evidence admissible only on a charge that failed or was invalid as a matter of law." "In the more typical case of conviction on some counts and acquittal on others, 'the time to decide whether it is fair to subject a defendant to a single trial for a variety of crimes is before trial, when the defendant can complain of misjoinder or move for a severance.'" "In essence, by invoking the retroactive misjoinder doctrine," the defendant in such a case "is attempting to avoid the general rule" that the failure to request a severance of charges prior to trial waives the issue on appeal.

Conspiracy

Duane Henderson v. State
https://courts.ms.gov/Images/Opinions/CO153005.pdf

Henderson contacted April Newman through Facebook Messenger and offered to supply her with methamphetamine. April contacted police and they set up a controlled drug delivery from Henderson. Police pulled Henderson over on his way to the deal and obtained his consent to search his vehicle and person. They found meth. Henderson was

charged with conspiracy to distribute meth and possession with intent to distribute.

The Court found that the State failed to prove Henderson conspired with anyone to distribute methamphetamine. April's role was limited to posing as a drug user and arranging a transaction. Because the two did not conspire to distribute methamphetamine, Henderson's conspiracy conviction was reversed.

In 2007, § 97-1-1(2) was amended to criminalize **unilateral conspiracies** – when a person enters a criminal conspiracy with a law-enforcement officer or informant and that person was not entrapped.

There must be a mutual agreement to accomplish some common criminal objective, even though the officer or informant had no true criminal intent. Under Section 97-1-1(2), April's role as an informant did not itself preclude a conspiracy conviction. But the State still had to prove a conspiracy existed between April and Henderson. There was no evidence that Henderson had conspired with April or anyone else to distribute the drug.

Search and Seizure

***Torres v. Madrid*,** (SCOTUS)

https://www.supremecourt.gov/opinions/20pdf/19-292_21p3.pdf

Two officers approached Torres while searching for a wanted person. As the officers neared Torres, she got into the driver's seat of a car and closed the door. One of the officers tried opening the door, but Torres drove off. Both officers fired at the moving car. Two of the shots hit Torres, but she continued driving. She pulled over and stole another car

and drove to a hospital 75 miles away. Torres was later found and arrested.

She pleaded no contest to numerous charges and subsequently sued the officers under Section 1983, claiming that they unreasonably seized her in violation of the Fourth Amendment. The District Court granted summary judgment for the officers on the basis that their conduct was not a Fourth Amendment seizure. The Tenth Circuit affirmed. The Supreme Court granted certiorari to resolve the question of whether the application of physical force to a person is a seizure even if the force is insufficient to gain control of the person.

The Torres Court opined that a Fourth Amendment seizure occurs when an officer applies "physical force to the body of a person with intent to restrain…even if the person does not submit and is not subdued."

The Court concluded that Torres was seized for Fourth Amendment purposes when the officers' bullets—fired with the intent to restrain—struck her. It was irrelevant to the seizure analysis that Torres continued to flee after being shot. The Court stressed that incidental touching, without intent to restrain, are not seizures. The Court also noted that "the Fourth Amendment does not recognize any continuing arrest during the period of fugitivity." Thus, if an officer touches a person with the intent to restrain and the individual immediately escapes, only a brief seizure has occurred. However, "brief seizures are seizures all the same."

Michael Buford v. State
https://courts.ms.gov/Images/Opinions/CO155504.pdf

Responding to a call about a landlord-tenant dispute, an officer asked Buford, a holdover tenant, "did he have any issues with [the officer] searching him and he advised he did not." The officer did a pat-down of Buford's person and felt a can of smokeless tobacco. He opened the tobacco can and found crystal meth.

Buford testified that he never gave the officer consent to search his person. On cross-examination, the officer stated that he did not specifically ask for consent to search the tobacco can but said that he asked Buford did he have any issues with me searching anything on him but did not ask him specifically about the can.

Buford argued that any consent to the search of his person did not extend to the closed tobacco can found in his pocket.

Police do not have to separately request permission to search each closed container found during a general search. It was reasonable for Buford to expect a search of the can - Buford was wearing only a pair of shorts, so it cannot be said that he retained a reasonable expectation of privacy in the contents of a tobacco can found in his pocket.

Caniglia v. Strom (SCOTUS)

https://www.supremecourt.gov/opinions/20pdf/20-157_8mjp.pdf

Caniglia put a gun on a table and asked his wife to shoot him during an argument. The wife left and stayed overnight at a hotel. The next morning the wife asked the police to conduct a welfare check. She met officers at the home where they found Caniglia on the porch. He denied being suicidal but agreed to a psychiatric evaluation. After Caniglia left for the hospital, the officers warrantlessly entered the home and seized Caniglia's guns. Caniglia later sued the officers in U.S. District Court

under Section 1983, claiming that they violated his Fourth Amendment rights.

The District Court granted summary judgment for the officers under the community caretaking doctrine, which previously applied only to automobiles. SCOTUS granted certiorari to determine if the community caretaking doctrine extended to homes.

The holding was that the community caretaking doctrine does not authorize the warrantless entry into a home. Consistent with its longstanding practice of affording the home paramount Fourth Amendment protection, the Court explained that "[w]hat is reasonable for vehicles is different from what is reasonable for homes."

Concurring opinions emphasized that the ruling did not alter the exigent circumstances exception "to assist persons who are seriously injured or threatened with such injury" where the requirements would likely be met in many commonly occurring "welfare check" scenarios.

Double Jeopardy

Arlaundris Jones v. State

https://courts.ms.gov/Images/Opinions/CO156155.pdf

Jones was convicted of aggravated assault and abuse of a vulnerable person. He hit an elderly woman over the head with a stick and stole her purse. Jones was acquitted of armed robbery.

The prohibition against double jeopardy did not preclude Jones' aggravated assault conviction with enhancement for an over 65 year old victim coupled with a conviction for abuse of an vulnerable person. Because enhancements to a sentence "do not overlap with the

elements of another felony" so, "sentence-enhancement statutes under which additional terms of imprisonment are imposed do not result in double-jeopardy violations." We hold that the "aggravator" of a conviction for attacking a person sixty-five years or older "does not delineate an independent substantive offense" from the crime of aggravated assault and does not trigger a violation of double jeopardy.

Ineffective Assistance of Counsel

Cynthia Burford v. State

https://courts.ms.gov/Images/Opinions/CO154279.pdf

Burford was with her boyfriend who committed a house burglary. The issue was whether Burford was an accessory before the fact (i.e., a principal) or an accessory after the fact. Burford gave a confession to being present and participating in the get away, but her admissions were admittedly induced by multiple promises of reward. Counsel did not file a motion to suppress but objected to Burford's confession after it had been introduced. Burford's burglary conviction was reversed for ineffective assistance of counsel.

"Under the circumstances, defense counsel rendered deficient performance by failing to make a timely motion to suppress the video confession and a subsequent written confession. Burford was prejudiced because a reasonable probability existed that the trial court would have granted a timely motion to suppress the confessions and because the confessions were the primary evidence of Burford's guilt of burglary of a dwelling." Reversed with remand for a new trial.

Patrick Newell v. State

https://courts.ms.gov/Images/Opinions/CO156299.pdf

Newell was convicted of possession of meth with intent to distribute. Newell was stopped for speeding. A subsequent search of his vehicle with a warrant produced the contraband.

Newell was interviewed and a recording was admitted into evidence. During the interview, Newell was asked about the traffic stop but was also questioned about his participation in or knowledge of other crimes and investigations.

Newell's first attorney filed motions to suppress fruits of the search and the interview. These motions were never brought up for a ruling and trial proceeded with a second attorney and Newell was convicted.

On appeal, Newell argued that he received ineffective assistance of counsel at trial for counsel (1) failing to pursue a motion to suppress evidence obtained during the search of his vehicle, and (2) failing to object to the testimony presented regarding prior alleged bad acts.

The Court declined to review the suppression aspect because the record was not developed. But the court considered admission of the prior bad act evidence introduced without objection. During the interview, the interviewer spent most of the time getting info about a bigger target named "Mon."

Newell's defense was that the drugs in the car belonged to someone else. Newell testified that "Mon" borrowed his car on occasion to transport drugs. Newell's counsel's closing argument relied on the contents of the video interview to present Newell's defense. The defense theory was that the meth could have been left in Newell's vehicle by "Mon" – an informed and strategic decision not to object – not ineffective assistance.

Character Evidence

Robert Decatur v. State
https://courts.ms.gov/Images/Opinions/CO154045.pdf

Second degree murder involving a dispute about a dog. Decatur was prevented from offering the testimony of his good character for peacefulness- Rule 404(a). The COA found that it was error to exclude the testimony, but the error was harmless. Court ruled no prejudice because Decatur (alone) was able to present evidence of his defense.

Hearsay

Decatur cont.

Decatur also wanted to present witness testimony that the victim was one of three men who had threatened him prior to the shooting. The trial court had ruled the threats were hearsay. Actually, the man who was killed never threatened Decatur, someone else did, but it was indirect threats. Decatur never actually heard the threat except by second-hand relay.

The Court found that Decatur failed to demonstrate "a causal relationship between the threat and the purpose for which it was offered."

Lavar Williams v. State
https://courts.ms.gov/Images/Opinions/CO153320.pdf

The trial court refused to admit an affidavit of a guy named Michael Brown taking responsibility for Williams' marijuana charge. Brown could not be found to subpoena, so Williams argued unavailable witness and statement against interest. The Court ruled the defense did

not try hard enough to find Brown to served him – they had a subpoena issued Friday for Monday trial – lack of diligence. The affidavit was not admissible as statement against interest because Williams had a guy named Smith sign an affidavit for the gun under coercion and Brown's affidavit was signed the same day – so there was a lack of proof of trustworthiness – no abuse of discretion in denying Brown's affidavit.

Manslaughter Instruction

Robert Decatur v. State *(supra)*

https://courts.ms.gov/Images/Opinions/CO154045.pdf

Decatur was not entitled to a heat of passion manslaughter instruction. Although Decatur testified that Butler had made threats against him and was initially hostile when they spoke on the phone, Decatur stated that he diffused the situation before ending the conversation. Caselaw holds that words and disagreements, without more, constitute insufficient provocation for heat-of-passion manslaughter. The evidence failed to support Decatur's assertions that he acted due to uncontrollable passion or anger that was "suddenly aroused at the time of the killing by some immediate and reasonable provocation."

Circumstantial Evidence Instruction

Johnny Nevels v. State

https://courts.ms.gov/Images/Opinions/CO156398.pdf

Finding that because circumstantial evidence is given the same weight as direct evidence and can support a jury's guilty verdict, the court overruled prior case law that required a special instruction "ramping up" the burden of proof in circumstantial evidence cases.

Sentencing

Lavar Williams v. State - supra
https://courts.ms.gov/Images/Opinions/CO153320.pdf

Dexter Smith was arrested after a controlled FedEx delivery of 1.8 kilos of weed. The residence belonged to Lavar Williams. Smith said Williams hired him to take the deliver. A search of the residence produced cocaine, more weed and guns.

Issue: Was the sentence for the drug charges disproportionate? Williams was convicted of possession with intent – one count for weed, one count for the coke; he was sentenced as a 93-19-81 habitual and a subsequent drug offender - which doubled everything [60(pot) +80 (coke) = 140 years]. The sentences are to be served concurrently. The Court said the sentences are within the statutory ranges and not unconstitutionally disproportionate.

Allen Russell v. State
https://courts.ms.gov/Images/Opinions/CO152452.pdf

Good dissents on disproportionate sentencing.

Expungement

Azalean Rogers v. State
https://courts.ms.gov/Images/Opinions/CO153474.pdf

Rogers was sentenced for check forgery in two cases and sentenced to three concurrent years in each suspended on three years of probation. Rogers completed her sentence and moved for expungement in each case. The circuit court only granted the expungement in the first case, but not the second. The COA reversed.

Section 99-19-71(2)(a) says that a person is eligible for only one (1) felony expunction and the terms "one (1) conviction" and "one (1) felony expunction" mean and include all convictions that arose from a common nucleus of operative facts. The record was silent as to whether Roger's two cases arose from a common nucleus of operative facts. So, the COA vacated the circuit court's order of expungement and remanded the case for an evidentiary hearing as to whether Rogers' forgery convictions "arose from a common nucleus of operative facts." If the circuit court determines that is the case, the circuit court has the discretion to expunge both of Rogers' convictions.

Felony DUI

Raymond Hughes v. State

https://courts.ms.gov/Images/Opinions/CO154258.pdf

PCR - Hughes pled to two felony DUIs at the same time – a 2017 DUI (3d) and 2018 DUI (4th).

The Court found that an out of state DUI more than five years old could not be used as a predicate offense per the statute – so out went the 2018 DUI. The 2017 DUI could not but used to make a fourth because the cases were pled at the same time.

Experts

Tommie Queen v. State

https://courts.ms.gov/Images/Opinions/CO157005.pdf

A man with twenty-one years of investigating cruelty to animals who was a "nationally certified animal-cruelty officer" was properly allowed to testify as an expert in dog fighting and give an opinion that certain

equipment and the manner in which Queen kept his numerous dogs, circumstantially showed that Queen was raising fighting dogs and conducting dog fights. The expert's opinions and the circumstantial evidence providing the basis for the opinions was sufficient for conviction.

Interpreters

Luis Miguel Garcia-Lebron v. State
https://courts.ms.gov/Images/Opinions/CO155674.pdf

On appeal, Garcia-Lebron argued that the use of an uncertified court interpreter resulted in reversible error. Rule 4(A)(2) of the Mississippi Rules on Standards for Court Interpreters allows a court to appoint a "[n]on-credentialed court interpreter" if a certified or registered interpreter is not available, but "only upon a finding that diligent, good faith efforts to obtain an interpreter of higher preference have been made and none has been found to be reasonably available." The prosecution provided a certificate that Baertich had completed the AOC "Mississippi Court Interpreter Ethics and Skill Building Workshop" and a letter from the AOC congratulating Baertich for passing "the Written Examination of the Mississippi Court Interpreter Credentialing Program." Baertich's curriculum vitae showed that she has a BA in Spanish and a Master's in Teaching Spanish/English. She had been consistently employed as a Spanish professor at the USM since 2007. Although the circuit court did not expressly make the findings contemplated in Rule 4(B), the omission was harmless since there was more than sufficient information in the record to support the requisite findings. Garcia-Lebron did not demonstrate any prejudice resulted from Baertich's translation.

Changes in the Law – Retroactive or Not

Edwards v. Vannoy

https://www.supremecourt.gov/opinions/20pdf/19-5807_new2_jhek.pdf

The Court refused to apply its 2020 decision in *Ramos v. Louisiana* (unanimous verdict requirement) retroactively to cases on federal collateral review. The Court made explicit what had been implicit for years—a new rule of criminal procedure will never apply retroactively to cases on collateral review.